

ADMINISTRATIVE APPEAL DECISION
WET WALNUT CREEK PROFFERED PERMIT, FILE NO. 200501605
KANSAS CITY DISTRICT

February 14, 2007

Temporary Review Officer (TRO): James Luther Winters, U.S. Army Corps of Engineers (Corps), Northwestern Division

District Representatives: Matthew Jeppson, Office of Counsel Kansas City District (District), William Jeffries, Program Manager District-El Dorado Field Office, and Thomas McCabe, Project Manager District-El Dorado Field Office

Appellant: Ben Rogers, Manager for the Wet Walnut Creek Watershed Joint District No. 58 (Wet Walnut Creek District)

Appellant's Representatives: Tony Rues, attorney to the Wet Walnut Creek District, John Reh, consultant to the Wet Walnut Creek District, Paul Graves, Kansas Department of Agriculture (Water Resources), and Matthew Scherer, Kansas Department of Agriculture (Water Resources)

Authority: Section 404 of the Clean Water Act (CWA)

Receipt of Request for Appeal: September 22, 2006

Appeal Conference and Site Visit Date: December 1, 2006

Background Information: The District's Kansas State Regulatory Office received a Department of the Army permit application from the Appellant in conjunction with the construction of Cottonwood Creek Dam and impoundment. The Appellant's project is located in Sections 22 and 23, Township 17 South, Range 27 West, in Lane County, in western Kansas. The Appellant's proposal is to construct an earthen dam, having a maximum structural height of 31 feet, length of 1,040 feet, and consists of 67,000 cubic yards of earthen-filled material, of which a small portion would be discharged below Cottonwood Creek's ordinary high water level. An estimated 5,500 linear feet of ephemeral stream would be affected. Cottonwood Creek has a drainage area of native grassland with riparian woodlands and a habitat assessment rating as poor quality and riparian woodlands as fair quality. There are no wetlands determined to exist within the project area. The Appellant's basic project purpose is for flood control and the overall project purpose is for flood control with other benefits.

The Corps' regulations at 33 C.F.R. § 331.6 require that the Corps provide a proffered permit to applicants for activities the Corps intends to permit using a letter of permission or standard permit. Applicants can accept or object special conditions of the permit. The Corps' regulations at 33 C.F.R. § 331.2 define the Corps' first offering of the permit with special conditions as the initial proffered permit. If the applicant objects to the special conditions in an initial proffered permit, the District Engineer reviews those conditions and determines whether it is appropriate to modify some, all, or none of the permit special conditions. The District Engineer then offers the permit to the applicant a second time. The Corps' Regulations at 33 C.F.R. § 331.2 define the second offering of the permit as the proffered permit. The applicant can appeal a proffered permit to the appropriate Division Engineer if he still objects to the permit's special conditions, as was the case in this appeal. The administrative record identifies no administrative

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procedural errors by the KCD in conjunction with the proffered permit to the Wet Walnut Creek District.

The KCD's March 15, 2006 initial proffered permit included special conditions, which included mitigation the KCD considered necessary. By letter with attachments dated May 3, 2006, the Wet Walnut Creek District submitted its objections to three special permit conditions outlined in the initial proffered permit. The Appellant objected to the KCD's March 15, 2006 initial proffered permit "because the mitigation plan attached thereto is not based on habitat losses/gains measured by any accepted scientific method and for the attached rationale about specific items. More specifically, we object to the following: 1. Un-gated 2" flow through pipe is a violation of the Kansas Department of Water Resources permitting authority and is without scientific support; 2. The fenced off 100-foot wide grass buffer strip around sediment pool is unnecessary and impractical; 3. Exclusion of livestock from impoundment area is unnecessary and impractical, and due to expected fluctuating water levels, the water line for an alternate livestock water source is not practical."

By letter dated June 2, 2006, the KCD acknowledges objections of the Wet Walnut Creek District. By letter dated July 28, 2006 the KCD in accordance with 33 C.F.R. § 331.2 and 33 C.F.R. § 331.6(d) modified several permit conditions over which the Wet Walnut Creek District expressed objections. The Wet Walnut Creek District signed the Request for Appeal (RFA) form on September 18, 2006 objecting to the KCD's proffered permit. The signed RFA form was received on September 22, 2006 by the Corps Northwestern Division and in accordance with Administrative Appeal Regulations (33 C.F.R. § 331).

The Wet Walnut Creek District believes mitigation is not necessary and asserts their project is self-mitigating and does not need preparation of a mitigation plan. The Appellant states that it should receive a permit decision based on its proposed project with no mitigation as it requested. The proffered permit authorizes the discharge of fill material into 0.25 acres of Federally regulated waters of the United States.

This administrative appeal evaluates whether permit conditions required by the KCD, in a proffered (standard) permit were reasonable and consistent in accordance with Corps regulations, policies and officially promulgated policy guidance. The standard for the evaluation during an administrative appeals review of permit conditions is whether the permit conditions were arbitrary, capricious and not supported by substantial evidence in the administrative record.

The Appellant's specific reasons for appeal are listed below. The TRO conducted an appeal meeting and site visit. A copy of the TRO's meeting summary and site visit is attached.

Summary of Reasons for Appeal Submitted by Appellant:

Reason 1: The Appellant is objecting to the District's required mitigation of the un-gated two-inch flow through pipe.

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Reason 2: The Appellant is objecting to the District's required mitigation of the 100-foot wide native grass buffer strip.

Reason 3: The Appellant is objecting to the District's required mitigation of the fencing of the impoundment area for the purpose of excluding livestock.

Reason 4: The Appellant stated that the District's decision to require mitigation was based on procedural error, incorrect application of law, regulation or officially promulgated policy, omission of material fact, incorrect application of current regulatory criteria and associated guidance for identifying and delineating wetlands, incorrect application of Section 404(b)(1) Guidelines, and/or use of incorrect data.

Information Received during Appeal Review and its Disposition: The District provided the Temporary Review Officer (TRO) and Appellant with a copy of the administrative record. The information was considered during the appeal review. Information obtained during the appeal meeting and site visit conducted on December 1, 2006 was considered in the appeal review, to the extent that it provided clarification and/or explanation of the administrative record. During the appeal meeting, the Appellant provided the TRO with a 4-page document with attachments that was dated December 1, 2006. This information was considered to the extent that it clarified information in the administrative record. The Appellant's consultant provided the TRO with a USDA-SCS map, dated 1991 and entitled, "Wet Walnut Creek Watershed". This information was similar to a map contained in the administrative record and was considered clarifying for the appeal review.

Summary of Decision: The Kansas City District was within its authority to require mitigation for the identified impacts. The District has the discretion to consider all environmental impacts within the permit area in determining mitigation requirements. The administrative record contains documentation relative to the anticipated impacts to waters of the United States. The District required mitigation, which included modifications judged to be necessary in order to minimize impacts. The District's mitigation measures were, in part, required to meet the legal requirements as depicted in the State of Kansas Section 401 water quality standards and to ensure that the project complied with the Section 404(b)(1) Guidelines. (Section 230.10(a)) The District determined and the administrative record clearly shows that the required mitigation was directly related to the impact of the Appellant's proposal, appropriate to the scope and degree of those impacts (33 C.F.R. § 320.4), reasonably enforceable and implementable. The District's administrative record fully supported its conclusion that the permit conditions required by the District, in its proffered permit were reasonable and consistent in accordance with Corps regulations, policies and officially promulgated policy guidance. It is determined that the District was not arbitrary and capricious in developing permit conditions in conjunction with their required water management plan.

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Appellant's Clarifying Statements of December 1, 2006:

There continues to be disagreement between the District and Appellant on the matter of project impacts and mitigation. Within the administrative record and cited by the Appellant is a September 15, 2004 letter that was prepared by Dr. James Koelliker in conjunction with a request made by the Appellant asking Dr. Koelliker to offer an opinion as to whether or not the Appellant's dam proposal, and others like it in the watershed, would have a favorable impact on stream flow in the Wet Walnut Creek sub-watershed. Dr. Koelliker's letter in part read: "Essentially this structure will have very little, if any negative impact under any circumstances. The benefits of making the structure feasible, the small permanent pool that would result, some additional seepage and the release of minor amounts of bank storage along the stream to enhance stream flow are all important to the watershed and to the local area. For Site No. 149, it is my opinion that operating the structure with a small permanent pool would be prudent".

- "The evidence I have cited makes it highly likely that the USEPA was not looking at the correct watershed and/or that incorrect information exists in the database upon which their comments were based. The Corps should have investigated these inconsistencies and adjusted their permit requirements accordingly".
- The Appellant asserts that the District developed the mitigation plan based upon comments not from scientific studies. The Appellant's evidence is depicted in the following information provided by the Appellant.
- The Wet Walnut Creek Watershed District is different than drainages in the eastern half of the state; we do not have the surface water available; watershed dams are a way to enhance groundwater recharge in the region; with the Corps' 2" drawdown pipe we will lose a major portion of recharge capabilities and this takes away a water right. Fencing of the pool would cause more harm than good, forcing livestock downstream of the dam into the channel.
- Colonel Rossi pointed out in his July 28, 2006 memorandum that the NRCS in their Range and Pasture Handbook, recommends limiting access of livestock to ponds and streams to help prevent contamination. Nowhere in the document does it expand on excluding livestock.
- The fencing of the impoundment was not a requirement of the KDHE.
- The flood waters will drop 95 percent of sediment into the sediment pool enhancing downstream water quality.
- The KDHE stated that the TMDL does not prescribe fencing as a practice to be pursued, although riparian management and buffer strips are touted.
- In a telephone conversation between the District and Appellant discussing the August 22, 2005 letter from the EPA the Appellant believed the EPA was commenting on the wrong project. The EPA in their August 22, 2005 stated that in the Upper Walnut Watershed, 118 dams existed and that 174,585 acre feet of water was impounded. The Appellant finds this information incorrect. The Appellant indicated that in HUC 11030007 the Appellant has 10 dams constructed with a sediment pool storage of 2003 acre feet and a flood detention capacity of 18,079 acre feet. As of July 11, 2005 the Appellant asserted it had only 46.2 acre feet in storage. The Appellant indicated that EPA referenced that 23 percent of the stream miles have been channelized. The Appellant stated that NRCS Engineers believe the correct percentage to be closer to 0.23 percent. The Appellant stated that according to the EPA the creation of large

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permanent pools does not appear to be a practical method of flood control. The Appellant feels that this is another point misunderstood by the District and EPA. Regarding the waters in the Upper Walnut Watershed (HUC 8) being listed as impaired under Section 303(d) by the EPA the Appellant does not agree. The Appellant referenced EPA comments in which the EPA stated that the flooding of land is not always bad. The Appellant stated that this may be true in some places and asserted that the lower valley of the Wet Walnut Creek is mostly cultivated and irrigated and that flooding caused erosion of irrigated lands. The Appellant asserted that flooding is not always a benefit.

Appeal Decision Findings and Instructions for District Action (if required):

Reason 1: The Appellant is objecting to the District's required mitigation of the un-gated two-inch flow through pipe.

Finding: The appeal reason does not have merit.

Action: No action required by the District Engineer regarding this reason for appeal.

Discussion: Mitigation is always an important part of the Corps of Engineers' permit evaluation and balancing process. Mitigation measures may be required to meet legal requirements, such as compliance under Section 401 water quality certification and/or to ensure a project complies with EPA's Section 404(b)(1) Guidelines. Mitigation, in this case, was incorporated by the Kansas City District in order to ensure that the Appellant's project was not, in the end, contrary to the public interest. The consideration of mitigation by the District occurred throughout the duration of permit processing and the administrative record provides sufficient documentation in support of this end. As stated on page 7 of the decision document's statement of findings (SOF) under the heading of Mitigation, "The applicant did not provide a mitigation proposal, due to their opinion that mitigation was not necessary. Mitigation is required to offset the impacts to projects for DA permits, and therefore has been required by the Corps." The District went on to state that, "Based upon the public interest review, mitigation requirements are necessary to insure that the design of this structure is the least damaging practicable alternative that meets the project purpose and need". "Since the applicant did not provide a mitigation proposal, mitigation requirements have been created and are a condition of this DA permit. The mitigation requirements are found in Attachment 12.14."

As a matter of reference, the District may need to consider the guidance stated in the Preamble to the Corps' "Regulatory Programs of the Corps of Engineers; Final Rule (51 Fed Reg. 41208, November 13, 1986". In part the Preamble states: "If an applicant refuses to provide compensatory mitigation which the district engineer determines is necessary to ensure that the proposed activity is not contrary to the public interest, the permit must be denied". Also, the Corps' regulations at 33 C.F.R. § 325.4(c) state that: "If the district engineer determines that special conditions are necessary to insure the proposal will not be contrary to the public interest, but those conditions would not be reasonably implementable or enforceable, he will deny the permit." A further discussion on the Corps' public interest review and Guidelines processes is found under the Discussion Section in Reason 4.

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In the administrative record is a letter from the Kansas Department of Health and Environment and was sent to the Kansas City District on March 10, 2006 certifying the Appellant's project under Section 401 of the CWA (33 U.S.C. § 1341). The State of Kansas water quality certification letter contained several conditions that were incorporated into the Appellant's proffered permit. The District's mitigation plan was approved and consisted of a water management plan that would ensure Cottonwood Creek's channel located downstream of the dam be supplied with water that at least equals that of pre-project conditions. As stated in the State's water quality certification letter, "This plan will include a structure consisting of a 2" continuous flow through pipe that is not regulated (opened and closed) by man, but instead set at an appropriate elevation that yields the desired flows".

As stated on page 3 of the decision document, "The applicant did not respond to any concerns or comments from the USEPA due to the wrong site location referenced on USEPA's comment letter, although all the comments and concerns by the USEPA were for the correct site location. The applicant was informed of this typo by a telephone call, and informed that the comments and concerns stated by the USEPA were for the correct site location but the applicant still decided not to respond to the USEPA comments and concerns." The applicant did not respond to any concerns or comments from the USFWS. As stated on page 3 of the decision document, "Mitigation requirements have been established in order to insure that the design of this structure is the least damaging practicable alternative that meets the project purpose and need. This activity as now proposed with the required mitigation represents the least damaging practicable alternative that meets the project purpose and need."

Reason 2: The Appellant objects to the District's required mitigation of the 100-foot wide native grass buffer strip.

Finding: The appeal reason does not have merit.

Action: No action required by the District Engineer regarding this reason for appeal.

Discussion: Buffers are upland or riparian areas that protect aquatic resources from developed areas and agricultural lands. The Corps' Standard Operating Procedures for the Regulatory Program (SOP) dated April 8, 1999, paragraph 17 states that special justification should be referenced when upland buffers are incorporated into the decision. RGL-02-2 allows, under limited circumstances, for the inclusion of upland areas within compensatory mitigation to the degree that the protection and management of such areas is an enhancement of aquatic functions and increases the overall ecological functioning of the mitigation site, or other aquatic resources. The Kansas City District required the establishment of a 100-foot buffer, in part, to ensure that the mitigation for the Appellant's project performs as designed. The administrative record sufficiently supports its conclusion for the establishment of a buffer as opposed to the Appellant's proposal for self-mitigation.

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Colonel Rossi's letter, which is found in the administrative record and was sent to the Appellant on July 28, 2006 made clear that he has reviewed the Appellant's objections to the special conditions of the initial proffered permit and provided modifications.

Colonel Rossi's letter stated that the ungated 2" pipe is not a violation of the KDWR and referenced his letter sent to the KDWR on June 5, 2006. On the issue of constructing a 26.6 acre dam with permanent impoundment he stated that, "In the absence of data justifying the need for a 26.6 acre lake for flood control, I have determined that augmentation of downstream flow by installation of a 2" diameter ungated pipe at the 11-acre pool elevation is a practicable alternative that would minimize the potential impacts to aquatic resources due to stream channel dewatering associated with the impoundment. Through our public interest review process, the USFWS, USEPA and KDWP identified stream dewatering as potential negative impact associated with your project. I consider the 11-acre pool elevation reasonable and practicable because the project can meet both the primary and secondary purposes of the lake while minimizing the potential for negative aquatic impacts downstream".

Referencing the September 15, 2004 letter prepared by Dr. James Koelliker, Colonel Rossi stated that, "I have determined that potential seepage does not ensure that aquatic impacts downstream of the structure will be avoided. With the lack of sufficient assurance that stream dewatering would not occur, I have determined that this is a reasonable condition".

Regarding the need for a fenced-off 100-foot wide buffer around the sediment pool Colonel Rossi stated in his letter that, "I have determined that this condition is reasonable and necessary. It is proportional to anticipated impacts, consistent with project purposes and likely to achieve the desired result of minimizing impacts to water quality". He further mentioned that the watershed is listed as impaired under Section 303(d). "The comments supplied by the resource agencies prescribed a larger width buffer strip; however we determined that a 100' width is adequate due to consideration of vegetation types, soil types, and topography".

Regarding the need to exclude livestock from the impoundment area Colonel Rossi stated in his letter that, "I have determined that this condition is reasonable and necessary. It too is proportional to anticipated impacts, consistent with project purposes and likely to achieve the desired result of minimizing impacts to water quality". "The USEPA and USFWS requested livestock exclusion from the pond and dam and requested that alternatives be considered in regards to offsite livestock watering. The Kansas Department of Health and Environment, in the 401 Water Quality Certification, recommends that additional practices be considered for implementation with regards to livestock watering. Offsite livestock watering is a reasonable and practical measure that will help protect water quality and not reduce the effectiveness of the primary project purpose".

Reason 3: The Appellant objects to the District's required mitigation of the fencing of the impoundment area for the purpose of excluding livestock.

Finding: The appeal reason does not have merit.

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Action: No action required by the District Engineer regarding this reason for appeal.

Discussion: The Kansas City District was within its authority to require this mitigation feature. The District has the discretion to consider all environmental impacts within the permit area in determining appropriate mitigation requirements. The administrative record provided sufficient documentation relative to the anticipated impacts as discussed in the Discussion Section in the last paragraph under Reason 2.

Reason 4: The Appellant states that the District's decision to require mitigation was based on procedural error, incorrect application of law, regulation or officially promulgated policy, omission of material fact, incorrect application of current regulatory criteria and associated guidance for identifying and delineating wetlands, incorrect application of Section 404(b)(1) guidelines, and/or use of incorrect data.

Finding: The appeal reason does not have merit.

Action: No action required by the District Engineer regarding this reason for appeal.

Discussion: The U.S. Army Corps of Engineers mitigation policy is defined by regulations 320.4 (r) and 320.4 (r) of the Preamble to the Corps "Regulatory Programs of the Corps of Engineers; Final Rule" (Fed Reg V. 51, page 41208 November 13, 1986) and the guidance in the February 6, 1990 "Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404 (b)(1) Guidelines" (commonly referenced as the EPA/Army Mitigation MOA).

EPA's Section 404 (b)(1) Guidelines (Guidelines) at 40 C.F.R. § 230 and entitled, "Guidelines for Specification of Disposal Sites for Dredged or Fill Material" (Federal Register Vol 45. page 85336, December 24, 1980) were developed by the EPA in conjunction with the Secretary of the Army and are consistent with the policies expressed in the Clean Water Act and are intended to implement those policies.

Under the Preamble if an applicant refuses to provide mitigation which a District Engineer determines is necessary to ensure that a proposed activity is not contrary to the public interest, the permit must be denied. Also, at 33 C.F.R § 325.4 (c) if a District Engineer determines that special conditions are necessary to insure a proposal would not be contrary to the public interest, but the conditions would not be reasonably implementable or enforceable, he will deny the permit. The EPA/Army Mitigation MOA recognizes that regulations of the CEQ define mitigation to include avoiding impacts, minimizing impacts, rectifying impacts, reducing impacts over time, and compensating for impacts. The EPA/Army Mitigation MOA notes that three kinds of mitigation are compatible with the Guidelines and can be combined to form mitigation sequencing including avoidance, minimization, and compensation. Generally, mitigation is defined by five descriptions listed in the Counsel of Environmental Quality (CEQ) Regulations at 40 C.F.R. § 1508.20.

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The Corps' mitigation requirements fall into three categories to include project modifications, mitigation measures for the Guidelines, and mitigation measures required as a result of the public interest review. The Guidelines and the public interest review are both administrative processes but are independent of each other. A project must be in compliance with the Guidelines and must not be contrary to the public interest in order to be permit table by the Corps.

Specific to KCD reaching the final decision to issue this permit, the Corps regulations at 33 C.F.R. § 320.4 (r) includes a description of a District Engineer's authority to require mitigation. Specifically, a District Engineer may at 33 C.F.R. § 320.4 (r)(i) require mitigation for minor modifications of a project. Also, at 33 C.F.R. § 320.4 (r)(ii) mitigation would be required to ensure that an applicant's project fully complies with the Guidelines. And finally, at 33 C.F.R. § 320.4 (r)(iii) mitigation measures in addition to those mentioned above may be required as a result of the public interest review process.

The Guidelines set forth four restrictions that must be satisfied before the Corps may issue a permit. First, the Corps must determine whether a less environmentally damaging practicable alternative to the proposed discharge is available. If such a practicable alternative exists, the applicant must avoid placing dredged or fill material in the originally proposed site. Second, the proposed discharge must not violate a state's water quality standards, other provisions of the Clean Water Act, or the requirements of the Endangered Species Act and the Marine Protection, Research, and Sanctuaries Act. Third, the proposed discharge must not cause or contribute to significant degradation of waters of the United States. Fourth, the applicant must take all appropriate and practicable steps to minimize the discharge's potential adverse effects on the aquatic ecosystem. The first and fourth requirements, avoidance and minimization constitute mitigation measures.

The administrative record contains sufficient documentation that the KCD reasonably identified impacts and ensured the impacts were avoided to the extent practicable. As the record shows the District's actions resulted in selecting a project determined to be less environmentally damaging. As stated on page 7 of the decision document, "The applicant, with the assistance of the Natural Resources Conservation Service (NRCS), determined that Site No. 149 was one of seven dam sites selected out of a total of 31 sites investigated that could reduce flood damages within this sub-watershed. Alternative flood control measures such as land use changes and other structural measures were considered but rejected by the applicant due to lack of economic feasibility and local acceptance. The preliminary design for the proposed dam would have impacted 6,500 linear feet of ephemeral stream channel, but a design change in the spillway outlet channel resulted in a reduction of 1,000 linear feet of stream channel impacts".

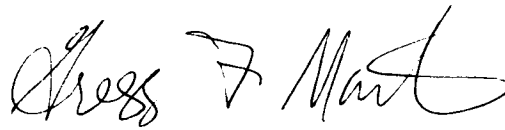
The administrative record shows that the KCD identified remaining unavoidable project impacts and implemented mitigation measures to the extent determined to be appropriate and practicable. In this instance, the District minimized impacts through the implementation of special permit conditions. District Engineers may add special permit conditions when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the public interest requirements. The District's special permit conditions are directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable. (33 C.F.R. §

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325.4(a)) The administrative record shows that the District gave appropriate consideration to the written responses of the resource agencies and others. In response to the District's public notice, Federal and State agencies sent comment letters stating that mitigation should be required as part of the permit authorization.

Overall Conclusion:

After reviewing and evaluating information provided by the Appellant, the District's administrative record and information obtained during the appeal conference, I conclude that this Request for Appeal does not have merit pursuant to the reasons contained in the findings above. It is determined that the District has provided sufficient evidence in the administrative record to support their determination for the mitigation requirement.

A handwritten signature in black ink, appearing to read "Gregg F. Martin". The signature is fluid and cursive, with the first name "Gregg" and last name "Martin" clearly distinguishable.

GREGG F. MARTIN
Brigadier General, U.S. Army
Division Commander